ORIENTAL HOLDINGS SDN. BHD. v. GOVERNMENT OF THE STATE OF PENANG & GOVERNMENT OF MALAYSIA

[O.C.J. (Chang Min Tat J.) September 26, 1972]

[Penang — Civil Suit No. 428 of 1970]

Land Laws — Subsidiary legislation under the National Land Code — Increased land rents — Validity of subsidiary legislation — Whether land held under statutory land grant issued under State Lands Ordinance (S.S. Cap. 113) is alienated land.

Declaration — Action for — Allegations that subsidiary legislation is null and void — Whether case within jurisdiction of High Court.

In this action the plaintiffs sought for declarations:—

(a) that the purported laws (1) the Notice of Periodic Revision of Rent published under Penang P.U.4 of 1970 and (2) the Standard Rate Rent Direction published under Penang P.U.32 of 1969 were null and void and of no operative effect;

(b) that the Legal Notification P.U.(A)526 of 1969 was *ultra vires* section 439 of the National Land Code.

(c) that the plaintiff's land was not alienated land within the meaning of section 101 or section 102 of the Land Code.

It was contended for the plaintiffs that as the land had been granted under the condition laid down in the grant that the land rent of $2.10 was to be payable until 1974, it was illegal to prescribe a new enhanced land rent, as was purported to be done by the legislation.

Held: (1) as at present advised, in view of the concession by both counsel that the court had jurisdiction to make a declaration as to the validity of the subsidiary legislations, the court would accept jurisdiction in this case;

(2) the plaintiff's land which was granted under the powers conferred by the State Lands Ordinance was "alienated land" within the meaning of the National Land Code;

(3) that therefore the subsidiary legislations were made in exercise to the powers conferred by the National Land Code and were therefore not invalid;

(4) the government was not bound by any limitations imposed by the previous government in respect of the statutory land grants.

Case referred to:-

(1) *State of Bihar* v. *Komashwar Singh* A.I.R. 1952 S.C. 252.

CIVIL SUIT.

Lim Kean Chye for the plaintiffs.

Abu Talib bin Othman (Legal Adviser, Penang) for the defendants.

Cur. Adv. Vult.

Chang Min Tat J.: This action springs from the conversion of the land registration system from the registration of deeds to the registration of titles under what is generally known from its origin as the Torrens system and from the imposition by the State Authority of Penang of a hugely increased land rent.

The land which is the subject-matter of this action is derived from a statutory land grant made on 8 June 1959 whereby the Governor of Penang under and by virtue of the power conferred on him by the State Lands Ordinance (Cap. 113 S.S. Laws) granted to the Prye (Penang) Syndicate Ltd. the piece of land to hold the same unto the grantee, its heirs and assigns for ever, subject to the payment of an annual rent of $2.10¢ and subject to the covenants and conditions contained in the Ordinance. By an endorsement on the said grant, this annual rent was to be paid until 31 December 1974.

The covenants and conditions referred to are not relevant to the consideration of this case, as nothing turns on them. No reference needs be made to them. But the endorsement was, in the plaintiffs' case, of the utmost importance as it was part of their contention that by reason of it, there could be no increment in the annual rent until the expiry of the period therein mentioned. The plaintiffs are the successor in title to the land in question.

The history of the relevant legislations in the matter is briefly as follows:

In 1963, Parliament passed the National Land Code (Penang and Malacca Titles) Act No. 2 of 1963 (hereinafter called the 1963 Act) for the purpose as expressed in the title of providing

"for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles, for the assimilation of such system to the provisions of the National Land Code and for matters incidental thereto."

It should not need pointing out that Penang and Malacca were hitherto the two remaining states in the Federation which subscribed to the old English system of registration of deeds as proof of title to lands. This Act, as amended by Act 55 of 1965 was by L.N. No. 475 dated 23 December 1965 brought into force on 1 January 1966.

By Act No. 56 of 1965, it being deemed

"expedient for the purpose only of ensuring uniformity of land and policy to make a law with respect to land tenure, registration of titles, relating to land, transfer of land, leases and charges in respect of land and easements and other rights and interests in land,"

Parliament enacted the National Land Code, which was an Act, as stated in the heading thereto

"to amend and consolidate the laws relating to land and land tenure, registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu and for the purposes connected therewith."

This National Land Code (hereinafter called the Code) was brought into force on 1 January 1966.

It ought, I think, to be noted at this stage that both Acts were enacted pursuant to the provisions of Clause (4) of Article 76 of the Constitution. Now Article 76 confers upon Parliament power to legislate on any matter enumerated in the State List within certain limits. Land is Item 2 in List II of the Ninth Schedule to the Constitution and reserved as a state matter. Item 2(a) refers, *inter alia*, to land tenure. Clause (4) of Article 76 reads as follows: —

"Parliament may, for the purpose only of ensuring uniformity of land and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1)(b) and (3) shall not apply to any law relating to any such matter."

Clause (1)(b) is not in this context relevant but the saving of the operation of Clause (3) means that any law made in pursuance for the purpose of promoting uniformity of the laws of two or more states, does not require adoption by any state legislature before it comes into operation in that state.

It will be gathered from this attenuated history of recent land legislations that while the 1963 Act provided for the mechanics of conversion to the new system, the Code has become the substantive law relating to land tenure.

In the conversion to land holdings, under the provision of section 40 of the 1963 Act, the title to the land in question became a grant. It is now held in two lots which were described in the statement of claim as Holdings Nos. 243 and 244 Mukim 1, Province Wellesley Centre, but are in fact Holdings Nos. 243 and 392.

The relevant sections of the Code under which the increased land rents were imposed are section 101, section 102 and section 439 of the Code.

"101. (1) Subject to the provisions of sub-section (5), the State Authority may from time to time revise in accordance with the following provisions of this section the rents payable in respect of alienated lands within the State.

(2) Any revision under this section shall extend to all alienated lands within the State except land of any class or description which the State Authority may think fit to exempt therefrom.

(3) On any revision under this section, the State Authority may —

(a) increase or reduce by the same proportion of rents payable in respect of all lands to which the revision extends, or

(b) make different provision for different classes or descriptions of such lands, being, in the case of each such class or description, either —

(i) provision for increasing or reducing rents by the same proportion, or

(ii) provision imposing a new rate of rent thereon.

(4) ....

(5) Revisions of rent under this section shall be made at such times as the State Authority may, with the approval of the National Land Council, determine but —

(a) in the case of the first such revision, not so as to have effect earlier than the beginning of the year 1970, and

(b) in the case of any subsequent revision, not so as to have effect before the expiry of a period of fifteen years beginning with the most recent date as from which any rents in the State were revised under this section."

"102. (1) The State Authority may direct with respect to any class or description of lands alienated before the commencement of this Act that, as from the beginning of such calendar year as may be specified in the direction, rent shall become payable at the standard rate in the case of all such lands other than any which are already subject to a higher rate.

(2) The rate of rent specified in any direction under this section shall be a rate per acre or lesser unit of area.

(3) A direction under this section shall apply to any land notwithstanding that it is held rent-free, or subject to any express provision in the document of title that the rent thereby reserved shall not be capable of revision.

(4) The power conferred by this section shall not be exercised more than once in respect of any class or description of land.

...."

"439. (1) With the concurrence of the State Authority, the Yang di-Pertuan Agong may by order under this section provide for the application of this Act in the States of Penang and Malacca subject to such modifications as he may consider necessary or desirable."

In L.N. 478 dated 18 December 1965, the Yang di-Pertuan Agong with the concurrence of the Governors of the States of Penang and Malacca and under the provisions of section 439 of the Code ordered in paragraph 9 of the Second Schedule that in the State of Penang section 101 and section 102 of the Code shall not apply in relation to (a) Grants (first grade) under the 1963 Act or final replacement title issued in respect of such grants and in paragraph 2(a) that

"subject to this schedule and where the context does not otherwise require (a) land held under interim title or a final replacement title shall be deemed to be land alienated before the commencement of the Code and references to alienated land shall be construed accordingly...."

By further order under P.U. (A) 526 dated 1 December 1969, the said paragraph 9 was deleted under the provisions of section 439 of the Code.

I interject at this juncture the proposition which I should imagine is not arguable that if, and I repeat, if, the exercise of the powers under section 439 of the Code is correct in both instances, the net effect of the two orders under the relevant legal notifications would be that section 101 and section 102 of the Code were brought back into effect in regard, *inter alia*, to grants (first grade). It must also mean, as a matter of logic, that if the exercise of the powers under section 439 in one instance was of no operative effect, then the exercise of the same powers in the other instance was similarly of no effect so that in the result, the position would be as if the powers had never been exercised, and we are left with the two sections of what is an Act of Parliament.

If I may so put it, with the repeal of the restraint upon grants (first grade), the stage was set for the revision of land rents in respect of alienated lands held under such grants. But it being now clear that the plaintiffs' land was held under grant, the need to attack the deletion of paragraph 9 of the Second Schedule in L.N. 478 disappeared since if caught at all, the plaintiffs' land would be caught under paragraph 2 only.

Next, in P.U. 39 of 1969 published on 31 December 1969 the following order under the Code was made:

"In exercise of the powers conferred by section 102 of the National Land Code, the State Authority hereby makes the following Direction:

1. This Direction may be cited as the National Land Code (Standard Rate Rent) Direction, 1969 and shall come into force on the 1st day of January, 1970.

2. As from the 1st day of January, 1970, subject to any order made under section 439 of the National Land Code, all lands alienated before the commencement of the National Land Code as classified or described in the First Column of the Schedule hereto shall be subject to payment of rent at the prevailing standard rate specified in the Second Column of the said Schedule."

I shall refer to this *Gazette* Notification as the Standard Rate Rent Direction. It appeared in the *Gazette* dated 31 December 1970.

On 20 January 1970, the Penang Government published Penang P.U. 4 in the following terms:

"In exercise of the powers conferred by sub-section (1) of section 101 of the National Land Code the State Authority

with the approval of the National Land Council hereby prescribed the revised rents as laid down in the Second Column of the First Schedule hereto as the rents payable in respect of alienated lands mentioned in the First Column therewith with effect from 1st of January, 1970 other than alienated lands described in the Second Schedule thereto."

It was also published under the hand of the Chief Minister of Penang and, though published on 20 January 1970, was signed by the Chief Minister on 16 December 1969. I shall refer to this *Gazette* Notification as the Notice of Periodic Revision of Rent.

The plaintiffs' land does not come within the exemptions in the Second Schedule of the Notice of Periodic Revision of Rent and appears to be caught both by the notice and the levy of the revised rents unless the Government can be prevented by an order of court from levying the increased rents or unless it can be shown, as in the contention of Encik Lim Kean Chye, learned counsel for the plaintiffs, (1) that the land is not alienated land within the purview of these two orders or (2) that if it is alienated land, then the subsidiary legislations providing for the first periodic revision to commence on 1 January 1970 and the imposition of the rate from that date are bad.

The action which they took or were advised to take was however not for an order prohibiting the State Authority, defined in the Code in the context of this case as the Governor of Penang or prohibiting the State Commissioner, now known as the Director of Lands and Mines for Penang and who under section 12 of the National Land Code was responsible to the State Authority for the due administration within the State of the provisions of the Code from imposing and collecting these increased land rents or acting in accordance therewith upon failure to pay the rents. It was for declarations that the purported laws published under (1) Penang P.U. 4 of 1970, (2) Penang P.U. 32 of 1969 were null and void and of no operative effect, for a further declaration that the Legal Notification P.U.(A) 526 was *ultra vires* section 439 of the Code, for another declaration that the plaintiffs' lands was not alienated lands within the meaning of section 101 or section 102 of the Code and for a last declaration which as I see it is a necessary concomitant of the immediately preceding prayer that paragraph 2(a) of the Schedule to L.N. 478 was *ultra vires* section 439 of the Code.

In acting thus, it seemed to me, the plaintiffs were paying regard to Article 4 of the Constitution. This article declares that:

"4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of such inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that —

(a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause."

and the regard paid was in particular to the provision in Clause (3) that "the validity of any law" ... "shall not be questioned" ... "except in proceedings for a declaration that the law is invalid."

The parties sued were first the Government of the State of Penang in respect of Penang P.U. 39 of 1969 and Penang P.U. 4 of 1970, and secondly the Government of the Federation in respect of paragraph 2(a) of the Schedule in L.N. 478 of 18 December 1965 and P.U. (A) 526 dated 1 December 1969.

The first defendant contended in its statement of defence that the orders in L.N. 478 of 1965 and in P.U.(A) 526 of 1969 were lawfully made by the Yang di-Pertuan Agong in exercise of his powers under section 439 of the National Land Code and that the Notice of Periodic Revision of Rent Order in Penang P.U. 4 of 1970 and the Standard Rate Rent Direction in Penang P.U. 39 of 1969 were lawfully made in exercise of the powers under section 101 and section 102 of the Code. It averred that in respect of the latter, the orders were made not by it, the Government of the State of Penang but by the State Authority. It therefore contended that the statement of claim disclosed no cause of action against it.

The second defendant, the Government of the Federation contended for the legality of the Federal Orders.

In respect of the plaintiffs' contention that the imposition of the land rent of $2.10¢ was not variable until after 1974 and the counter contention that it was, I take leave to refer to section 36 of the 1963 Act which provides that

"Subject to the provisions of the Act, upon the appointed day all pre-existing interests in all land in the State shall be extinguished and there shall be vested in all persons in whom were vested such interests such corresponding interests in the holdings created in relation to such lands under the provision of this Act and the right to such replacement titles to such holdings as are provided by this Chapter and unless otherwise provided by this Act, every pre-existing deed relating to a holding shall, on and after the appointed day, have effect only as evidence of the nature and extent of any pre-existing interest in such holding."

and section 37

"Upon the appointed day and thereafter until the title to a holding shall have been declared indefeasible in accordance with the provisions of Part VII,

(a) ....

(b) the proprietor of such holding and all other persons entitled to any interests therein shall hold such title or interest subject to all those provisions of the pre-existing law applicable thereto which are not inconsistent with the provision of the Act.

(c) ...."

For myself I should imagine that the proceedings in this action concerned also the validity of these provisions as the validity of the provisions referred to in the statement of claim must on a proper application and interpretation of section 36 and section 37 (b) of the 1963 Act be seen to be determined by the question whether the retention of the old land rate was or was not inconsistent with the provisions of the 1963 Act.

At the hearing of the action before me, it was conceded by learned counsel for the three parties hereto that no evidence needed to be called and that the action stood to be decided on the nature of the laws that had been promulgated. Nothing seemed clearer than this, but it also seemed to me that on this agreement and the apparent emplacement by the plaintiffs of the action within the ambit of Article 4 of the Constitution in the form in which it was framed, and having regard to this Article, the question arose whether I had the competence and the jurisdiction to hear this case. I also took the view that the question of jurisdiction stood to be determined before I considered the contention of the first defendant whether the statement of claim disclosed any cause of action against it, or proceeded to hear the substantive action.

In the view I first took, on a proper interpretation of Article 4 of the Constitution, the presence of the alternative "or" in Clause 3 to my mind, made the several actions contemplated therein disjunctive, so that apart from proceedings in (a) and (b) between the Federation and one or more States in respect of a Federal law or a State law respectively, proceedings between individuals or between an individual and the Federation and/or State or states in respect of the validity of any law were required to be for declaratory orders.

If this was so, then again on a proper construction of Clause (4) of Article 4, the leave of a judge of the Federal Court must first be obtained before the proceedings for a declaration were commenced. And nowhere in the cause papers could I discover such leave. In fact it was accepted that no leave has ever been obtained.

This apart, Article 128 of the Constitution must on a proper construction be read as depriving the High Court of any jurisdiction to entertain this or similar proceedings:

"128(1). The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter to which Parliament or, as the case may be the Legislature of the State has no power to make laws; and

(b) ...."

and providing that the proper and only forum for such proceedings was the Federal Court and the Federal Court only.

Accordingly, I invited counsel to address me on the question of my jurisdiction and indicated that the only proper course for me to take would be to satisfy myself whether I have jurisdiction. If I had not, then the action stood to be dismissed *in limine*.

Encik Lim Kean Chye submitted that on a proper construction of Article 4 the phrase "any law made by Parliament or the Legislature of any State" must mean any law enacted and passed by such legislatures and did not include any subsidiary legislation or orders or rules and regulations made in consequence of any power contained in any law so enacted.

Encik Abu Talib bin Othman, Legal Adviser for Penang appearing for both the defendants accepted this construction. I believe he did so on the pleadings. He reserved the right however if at any time the arguments turned on the question of the validity of an Act passed by Parliament or the State Legislature to submit that that would be beyond the jurisdiction of this court.

It seemed then and still seems to me with respect that having regard to the definition of law in the Interpretation and General Clauses Ordinance 1948 as *including* written law, and to the fact that by section 22(1) of the same Ordinance, it is provided that subsidiary legislation shall, unless otherwise provided, take effect and come into operation as law on the date of the publication in the *Gazette* and the definition of the powers of the High Court in section 417 of the National Land Code, it is at least arguable that the proper construction of Article 4 is a rather wider one than that contended for by Encik Lim and accepted by Encik Abu Talib.

But I defer to the opinions of counsel, and so without purporting to decide this issue which I conceive to be still open if this matter goes to a higher forum since jurisdiction goes to the root of the matter, I proposed to hear the case. I am aware that no amount of agreement by counsel can give jurisdiction where the law does not confer it but as at present advised, I do not think I should refuse.

The next point for decision is the contention that there is no cause of action against the first defendant. Now it is abundantly clear that the Standard Rate Rent Direction 1969 made under section 102 of the Code in Penang P.U. 39 of 1969 and the prescription of revised rents under section 101 of the Code in Penang P.U. 4 of 1970 were made by the State Authority in exercise of the powers under the relevant sections of the Code. Any attempt to declare the exercise of his powers as being null and void and of no operative effect must affect him and as a simple matter of the requirement of natural justice *"audi alterem partem,"* he should be heard. While it is true that under the Penang Constitution, the State Authority who according to the definition in section 5 of the Code is no other than the Governor of Penang, in this case, cannot be sued in person or as such authority there is as contended by the Legal Adviser statutory provision for his being joined in the action in section 16(2) of the Code. This sub-section reads as follows: —

"16(2). Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the Director of Lands and Mines in the name of his office."

If the "liability" in the sub-section is construable as a liability not to impose or collect rents other than in accordance with the law or contractual obligation, there is a certain force in the argument of the learned Legal Adviser.

It was however the contention of Encik Lim that the direction and notice of revision were issued under the hand of the Chief Minister of Penang and therefore were acts of the Government of the State of Penang. With respect, this contention ignored the provision of section 16 of the Delegation of Powers Ordinance No. 56 of 1956. Section 16 reads:

"Where by any written law any power is given to the Ruler or Governor of any State to make any regulation or order or give any direction, approval, permission or consent or where any document is required by any such law to be under the hand of, or signed or countersigned by the Ruler or Governor of any State, it shall be sufficient, unless it is otherwise expressed, for such regulation, order, direction, approval, permission, consent or document to be signified under the hand of, or signed or countersigned by, the Chief Minister of such State."

This was expressly done in these two cases. The issuance of these two orders was thus not the act of the Government of the State of Penang but that of the State Authority.

However, Order 16 rule 11 of the Rules of the Supreme Court provides that no cause shall be defeated, *inter alia,* by reason of non-joinder of parties and further that the court or a judge may, at any stage of the proceedings, either upon or without the application of either party and on terms order the necessary joinder.

Further section 16(3) of the Code provides that

"In any action, suit or other proceeding to which this section applies, the Director of Lands and Mines may appear personally or may be represented by any advocate and solicitor, any Federal Counsel, the State's Legal Adviser...."

The learned Legal Adviser for Penang was before me at the hearing. He could have, though admittedly under no obligation to do so, applied under Order 16 rule 12 for the Director of Lands and Mines to be joined in as a defendant. The adjudication of this matter, if properly before the court, is also the concern of the Government of Penang. Though the Government of Penang might well not be a proper party to the proceedings, the effect of joining him wrongly will be only a matter of costs, which I shall decide after hearing further submissions, but in all the circumstances of the case, and partly having regard to the fact that the Legal Adviser of Penang would be representing the State Authority if the Director of Lands and Mines had been joined as a party, I do not think any useful purpose will be served by striking out the case as showing no cause of action against the first defendant.

At this stage, Ishall have to refer to some necessary amendments to the pleadings which counsel on both sides were good enough to draw my attention to.

Holding No. 244 has been sub-divided and the holding in which the plaintiffs are interested is Holding No. 392.

Then Holdings Nos. 243 and 392 are held under and are so registered in the Interim Register as grants for the replacement titles and not, as stated in the statement of claim, as grants (first grade).

Now that the correct state of affairs had been brought to light, it was conceded that paragraph 9 of Second Schedule to L.N. 478 dated 18 December 1969 had no relevance to this case. There is therefore no necessity for the declaration sought in prayer (3) of the statement of claim that the Legal Notification P.U.(A) 526 is *ultra vires* section 439 of the Code.

Next, counsel desired to put in certain documents to establish the history of the land. They are xeroxed copies of

(1) Statutory Land Grant No. 14856 made on 8 June 1903 covering an area of 4624 acres.

(2) Statutory Land Grant No. 33 by the High Commissioner in and for the Federation of Malaya issued on 13 October 1950 to Prye (Penang) Syndicate Ltd. and covering an area of 103 acres 6 roods and 10 poles.

(3) Statutory Land Grant No. 313 by the Governor of Penang on 25 June 1959 of Lots 243 and 244 covering an area of 67 acres 1 rood and 10 poles and 12 acres 3 roods and 27 poles respectively to Prye (Penang) Syndicate Ltd.

(4) extracts of the Form D. of the Interim Registrar in respect of (a) holding No. 243 and (b) holding No. 392.

By consent of both counsel, such documents were taken as true copies of the originals and accepted in evidence.

It is clear from the endorsements on such documents and as a matter of law, in particular the operation of section 11 of Cap. 113 of the S. S. Laws, known as the Crown Lands Ordinance until 28 August 1956 and thereafter by amendment under the Federal Constitution (Modification of Laws) (Malacca and Penang) Order 1958 published under L.N. 253 of 1958 as the State Lands Ordinance, until its repeal by the 1963 Act, on 1 January 1966, that the only way to procure sub-division or partition of the land was for the grantee to first surrender the grant. Section 11 read:

"11.—(1) If the owner of the land comprised in any Crown grant or Crown lease for nine hundred and ninety-nine years is desirous of dividing or partitioning such land, he may apply to the Governor to accept the surrender of such grant or lease, and to re-grant the land comprised therein in parcels.

(2) The Governor if satisfied with the title of the applicant, and on payment by the applicant of all costs and expenses of, or consequent on, such application, shall accept a surrender of such grant or lease, and shall issue in lieu thereof to the applicant grants of the said land under this Part in such portions as the applicant desires.

(3) No such division or partition shall be allowed unless all arrears, if any, of rent under the original grant or lease are paid up, and in no grant issued under this section shall a less rent than fiifty cents per annum be reserved.

(4) In the case of grants issued under this section not being issued in exchange for a grant issued under this Part such modifications may be made in the form of grant prescribed as are necessary in order to make the new tenure not less beneficial than the original one."

Encik Lim urged on me to bear this in mind at all times in the consideration of this case. The land, he said, was granted to his clients and the latest grant to the predecessors in title of his clients was the statutory land grant No. 313 above on 25 June 1959. This was antecedent to the introduction of the new land system to Penang and antecedent to the impositio of a ew standard rent for lands in the state. There was never at any time prior any alienation. It was originally a grant and when surrendered for purposes of sub-divi-

sion, there was a re-grant. Even the latest grant on 25 June 1959 was under the State Lands Ordinance (Cap. 113) which though amended anteceded the changes in the system of land tenure in Penang.

The force of Encik Lim's arguments was therefore directed to the question wether the plaintiffs' land was or was not in law to be treated as alienated land, because if it was not, it was not caught by the subsidiary legislation now complained of, unless of course the subsidiary legislation was bad, in which case, it would not matter whether the land was alienated land or not.

It was part of his arguments that under Article 162 of the Constitution all existing laws until repealed continued in force with such modifications as might be made therein under this Article and subject to any amendments made by Federal or State law. For this reason, he was prepared to accept the modification of the Crown Lands Ordinance to State Lands Ordinance effected by L.N. 253 of 1958 within the period of 2 years specified in Clause 4 of Article 162, now repealed, however without prejudice to any other made under this clause but he contended that the fact of granting and not alienating the land and the condition laid on the grant that the land rent of $2.10¢ was to be payable until 1974 and not to be increased under section 11 of the State Lands Ordinance Cap. 113 together made for the illegality of the new standard rate being prescribed for and being collected from the land in question.

Now paragraph 2(a) of the Schedule to L.N. 478 dated 18 December 1965 has been cited earlier, but for convenience is now reproduced:

"2. Subject to this schedule and where the context does not otherwise require —

(a) land held under interim title or final placement title shall be deemed to be land alienated before the commencement of the Code and references to alienated land shall be construed accordingly."

Sub-paragraph (b) was not complained of but in view of the now known fact that the plaintiffs' land is in the Code held under grants in the Interim Register, must be referred to. It reads:

"(b) references to grants shall be deemed to include references to grants (first grade) and grants under the 1963 Act."

Penang P.U. 39, the Standard Land Rent Direction 1969, declared that as from 1 January 1970, subject to any order made under section 439 of the National Land Code, *all lands alienated before the commencement of the Code,* as classified or described in the schedule thereto shall be subject to payment of rent at the prevailing standard rate as prescribed in the Schedule.

By Penang P.U. 4 of 1970, the raised rents were prescribed as the rents payable in respect of *such alienated lands.*

If attention is focused on the words in the subsidiary legislations underlined by me, the force of Encik Lim's arguments will be seen. His argument to put it shortly was that if the land was not alienated land, then it was not caught by the subsidiary legislation. Aliter, if it was alienated land under the subsidiary legislation, then the subsidiary legislation was bad.

However Encik Lim with his usual frankness drew my attention to the definitions of "alienate" and "alienated lands" in section 5 of the Code. They are as follows:

" 'alienate' means to dispose of State land in perpetuity or for a term of years, in consideration of the payment of rent, and otherwise in accordance with the provisions of section 76 or, when used in relation to the period before the commencement of this Act, to dispose of State land in perpetuity or for a term of years under a previous land law (not being a law relating to mining);

'alienated land' means any land (including any parcel of a sub-divided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years, and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, but does not include mining land;"

The learned Legal Adviser on his own part also stressed these definitions and contended that the plaintiffs' land was alienated land within the meaning of the Code and caught by the subsidiary legislation for the payment of the revised rents at the prescribed standard rate as from 1 January 1970 and that the subsidiary legislations were valid.

I pause here to say that if in this judgment I do not refer in fuller details to the able arguments of the learned Legal Adviser, it is not for want of appreciation for this intrinsic soundness but it is because I think I can find the answer in the arguments of Encik Lim themselves.

It was not so submitted but the only way, it seems to me, to contend that the plaintiffs' land did not come within the definition of "alienated land," in the Code would be to suggest that the State Authority not being in existence before the coming into force of the Code could not therefore have made a grant of the plaintiffs' land, or alienated it. This would, as a consequence, render as entire surplusage the words "in exercise of powers conferred by the previous land law". There is however no justification for this interpretation, especially where in my view and with respect, the meaning is clear. Statutory grants of lands were previously made under the State Lands Ordinance. Therefore the State Authority defined in the Code as the Governor, must, where the grant of land was made prior to the coming into force of the Code, refer to the person in whom the power of granting or alienating land was vested and that person by the State Lands Ordinance read as modified by the aforesaid Federal Constitution (Modification of Laws) (Penang and Malacca) Order 1958 was the Governor of Penang, the predecessor in office of the State Authority. If my view is correct, it must follow that the plaintiffs' land which was granted by the Governor of Penang, then the State Authority, in exercise of the powers conferred on him by the State Lands Ordinance, must be alienated land within the meaning of the Code.

Further for myself, I do not see any purposeful difference in meaning between the words "grant" and "alienate" in their use. If at all, it is a purely technical one, grant being the word used in respect of land under the old law, and alienation under the new law.

Any difference is in this context meaningless since in the definition of "alienated land" in the Code there is a reference to grant.

It was also nowhere contended, least of all by Encik Lim nor do I think, with respect, that it could possibly be contended that it was not within the competence of Parliament to enact the definitions as aforesaid of "alienate" and "alienated land" or that such definitions were ultra vires the Constitution. That being so, then on the reading of the phrase "alienated land" wherever it appears in the subsidiary legislation in the meaning ascribed to it in the principal Act, a principle of interpretation which I take to be uncontroverted, the plaintiffs' land is alienated land within the meaning of the Code, though granted in the exercise of powers conferred by the previous land law.

As for the contention that the State could not increase the land rent because that would be to vary a contractual obligation previously undertaken by it, it must be borne in mind that before 1 January 1970 *i.e.* before the coming into force of the two Penang subsidiary legislations, the State Lands Ordinance had ceased to be law and save for the effect of the provisions of section 13 of the Interpretation and General Clauses Ordinance 1948 saving any right, privilege, *etc.* acquired under any written law that had been repealed and subject to the Conditions of Replacement Titles in the Third Schedule of the 1963 Act, the rights under the State Lands Ordinance must be regarded as extinguished or at the best exchanged for the rights under which land was held hereafter under the Code.

For reasons that will be obvious shortly, I do not, with respect, consider that the "rights" in section 13 of the Interpretation and General Clauses Ordinance 1948 refer to or mean or are caught by the obligation to pay only the rent previously fixed.

I find confirmation for the view that I have taken that Parliament had clearly envisaged that land previously alienated was to be treated as a alienated land within the meaning of the Code in this Third Schedule. The Schedule lays down conditions that are favourable for lands previously alienated. To add to or subtract from these conditions would be to legislate and no one except Parliament has a right to do so. The conditions in the Third Schedule do not include one for continuation of the previous rents. Ergo, it is not a right granted by Parliament.

It also seems to me that on a proper interpretation of the subsidiary legislations, both Federal and Penang, in the light of the definitions, particularly of "alienated land" in the Code, to say that the subsidiary legislations are either null and void and of no effect or are ultra vires the Code would be, in an indirect way, to attack the definitions as ultra vires or unconstitutional and even in the narrow interpretation of Article 4 by counsel I have no jurisdiction to adjudicate thereon.

However, if the definitions are accepted and on a proper construction of these definitions, the plaintiffs' land which had been granted in the exercise of powers conferred by the previous land law, must irresistibly be alienated land within the meaning of the Code.

In my view, therefore, L.N. 478 is clearly in proper exercise of the powers conferred by section 439 of the National Land Code. Paragraph 2 is not *ultra vires* section 439. If at all, it only serves to add force to the definition of alienated lands. The plaintiffs' land is now under interim title. It comes by this paragraph under alienated lands. This is a convenience that obviated the necessity of delving deeper into the history of the tenure or land holding.

So far as Penang P.U. 39 of 1969 and P.U. 4 of 1970 are concerned, they are clearly exercises of the powers contained in section 102 and section 101 respectively of the Code in respect of alienated lands. They cannot be null and void and of no operative effect. They must extend to alienated lands. The quarrel, as I understand the contention of the plaintiffs, is that they should apply to the plaintiffs' land in particular. I have already dealt with the question whether the plaintiffs' land is alienated land and for the reasons given I have held that it is. If so it is caught by subsidiary legislations about whose intrinsic nature there can be no quarrel.

If basically this case calls into question the right of Parliament or of the Government of a State in a Federation in the exercise of the powers reserved or granted to it in the Constitution to levy taxes other than those reserved by the previous government, the answer lies in this passage in paragraph 313 of the judgment of Mahajan J. in the case of the *State of Bihar* v. *Komeshwar Singh*[1] at page 313, to which the learned Legal Adviser had drawn my attention:

> "The Crown cannot deprive a legislature of the legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within its territory over which such legislative authority exists and no Court can annul the enactment of a legislative body acting within the legislative scope of its sovereign competence. If therefore it be found that the subject-matter of a Crown grant is within the competence of a provisional legislature, nothing can prevent that legislature from legislating about it, unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally."

The principle enshrined in this passage is too well-known to need support from any of the many similar *dicta* in other judgments. But the declaration in Article 4 that the Constitution is the supreme law and the doctrine of the supremacy of Parliament within the Constitution as well as the meaning of the sovereignty of a fully independent State must mean, among other things, that this Government is not bound by any limitations imposed by the previous government. The only restriction imposed upon it is that it acts within the Constitution.

Lastly I refer to an incidental complaint. It was said by Encik Lim that no one really knew under what section, section 101 or section 102 of the Code the State Authority purported to impose the revised rent. With respect, I think it is fairly obvious that under section 102 the State Authority prescribed a prevailing standard land rate and under section 101 it applied this new rate. Logically and also having regard to "before it revises any rents in the State under section 101," the direction should precede the application. The fact that the P.U. 4 of 1970 under section 101 preceded P.U. 39 of 1969 under section 102 in the matter

of publication in the Government *Gazette* is, to my mind, of no material consequence. If a mistake was made it was only in respect of the delay in publishing the earlier notification. The dates on the two notifications made that clear. It could have no fatal or any effect. On 1 January 1970, both came into effect and *ut magis res valeat qua pereat,* P.N. 4 of 1970, the notice of periodic revision, must be regarded as coming into effect immediately before P.U. 39 of 1969, the direction for the levy of the new rents.

The declarations sought are therefore refused as being unfounded in the law.

Application refused.

Solicitors: *Lim Kean Chye & Co.*

VEERASAMY v. BOARD OF MANAGERS OF THE METHODIST NATIONAL TYPE PRIMARY SCHOOL, TELOK DATOH

[O.C.J. (Yong J.) October 13, 1972]

[Kuala Lumpur — Civil Suit No. 451 of 1968]

Employment — Gardener working in school — Whether an "employee" — Termination of service — Education Act, 1961.

The questions for decision in this case was whether a gardener working in a school is an "employee" within the Education Act and whether his services could be terminated by notice.

Held: (1) a gardener, sweeper, or grass-cutter such as the plaintiff though working in a school was not an "employee" within the meaning of the Education Act, 1961;

(2) in this case the plaintiff was not dismissed but his contract of service was terminated by notice.

CIVIL SUIT.

Joginder Singh for the plaintiff.

Chin Yoong Chong for the defendant.

Yong J.: For verbosity and obscurity it would be difficult to find another statement of claim to excel the plaintiff's. He has filed two statements of claims, the amended is no better than the original. When properly understood his claim amounts to no more than a simple claim for damages for wrongful dismissal on various grounds which may be briefly stated as follows:-

(a) the plaintiff claimed that he was an "employee" within the meaning of the Education Act 1961 and as such he was entitled by implication to work until he had reached the retiring age of 60 years unless he was earlier dismissed for disobedience or misconduct, and that as he had not been so dismissed he now claimed damages of $12,898 being wages he would have earned for 9 years and 8 months from August 1, 1965 (date of his alleged dismissal) to March 31, 1975 (date of his retirement at the age of 60 years).

(b) plaintiff's dismissal was "illegal wrongful and/or unjustified."

(c) plaintiff was employed by the Board of managers of the primary school but was dismissed by the board of governors of the secondary school.

(d) plaintiff's dismissal was not properly approved by the board of managers nor confirmed by a subsequent meeting of the board.

(e) both boards were improperly constituted under the Education Act 1961.

(f) plaintiff's misconduct and disobedience had been condoned.

At the trial the plaintiff abandoned his claim for a declaration that his dismissal was "against the principles of natural justice and/or *ultra vires* void inoperative and of no effect and that he still is an employee of the board of managers." He also abandoned his plea that the board of managers and the board of governors were improperly constituted under the Education Act 1961.

It is not in dispute that the primary school and the secondary school were formerly one school known as "Methodist English School, Banting." In 1962 this school was divided into two sections. The primary school section came under the control of a headmaster and the secondary school section under a principal. The school fields, grounds, tuckshops, latrines and other facilities jointly used or shared by both sections were under the paramount control of the principal of the secondary school.

It is a common ground that the plaintiff was employed in the school as a gardener, sweeper, grass-cutter and a daily-rated labourer. He did not get a fixed monthly salary but was paid $3.50 for each and every day he had actually worked.

The first question which the court has to answer is: Was the plaintiff and "employee" within the meaning of the Education Act 1961. Could a person performing such lowly jobs as the plaintiff come within the definition of "employee" under section 2 of the Education Act 1961, the relevant parts of which read:-

"An 'employee' means a person ... employed or actively taking part in work connected with the running or the administration of an educational institution, but does not include a domestic servant or a person engaged in the repair, maintenance or upkeep of premises."

In my opinion a gardener, a sweeper, a grass-cutter or even a lavatory cleaner could not be said to be employed to run or administer an educational institution or actively taking part in the work connected therewith. Plaintiff was employed only to cut the grass and to maintain the cleanliness of the school and its grounds and not to run or administer the school.

By the said definition a domestic servant or a person "engaged in the repair, maintenance or upkeep of the premises" is expressly excluded. "Premises" according to the *English Oxford Dictionary* means "A house or building with its grounds or appurtenances." If this meaning is accepted it would clearly exclude a gardener, sweeper or grass-cutter engaged in the repair, maintenance or upkeep of the school and its grounds.

I therefore hold that a gardener, sweeper, or grass-cutter such as the plaintiff though working in a school